

Judicial “Reform” in Poland: The President’s Bills are as Unconstitutional as the Ones he Vetoed

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When last Thursday, 23 November 2017, the Polish parliament (Sejm) held the first plenary debate about the new bills on the judiciary, it achieved a record in the world history of parliamentarism: the first parliamentary debate that was entirely about a non-existing project. The presidential bills at the time were still subject to negotiations between the President and the leadership of the parliamentary majority, and while the outcome has not been reached yet, one thing was clear: the presidential proposals will not be submitted to the Sejm in the version in which they were drafted by the President’s lawyers. Hence the debate was moot, a fact which was recognized by the majority MPs who were conspicuously absent during the debate. This grotesque event is emblematic of the state of affairs in Poland regarding two draft laws vetoed by President Andrzej Duda last July, on the Supreme Court (SC) and on the National Council of Judiciary (Polish acronym: KRS).

So even as I am writing these words (28 November), the general public in Poland has no idea what specific changes to the presidential proposals have been agreed upon by the negotiators and will be debated in the Parliament soon, perhaps even later this week. “Negotiations” is the right word: the discussions between the President and the leader of governing “Law and Justice” party PiS, Jarosław Kaczyński, have been going on behind a thick veil of secrecy and are kept hidden from the public. That in itself is scandalous, of course: The matter of the “reform” of the judiciary is not a strategic or military or business issue which must be kept confidential. But the unexpected presidential veto of last July caused PiS a great sense of hurt and disappointment, and they have treated the matter as extremely sensitive. They do not want to have any unexpected objections from their own President anymore.

But make no mistake: The Presidential vetoes have not triggered any new proposals which would be qualitatively better in terms of consistency with the Constitution than the initial PiS bills that he vetoed. Both the PiS and the President’s proposals are glaringly unconstitutional, though in different ways. They differ in the ways they reflect different vested interests within different groups of the ruling elite more than in their interpretation of the Constitution. If, in next iterations of the debate, we see PiS adopting some of the ideas in the President’s bills, it will be a compromise between two unconstitutional proposals. Such a compromise, by its nature, cannot be constitutional.

Both laws vetoed by President and about to be discussed, in whatever new form given to it by PiS, aimed at politicising the KRS and the SC, by granting politicians some new, greatly enhanced instruments to affect the composition of the KRS and the SC. Regarding the KRS, the entire focus has been on the mode of selection of the 15 judicial members of the KRS (besides the heads of the Supreme Court and the Supreme Administrative Tribunal, the Minister of Justice, the representative of the President, four representatives of the Sejm and two representatives of the Senate, elected respectively by these bodies). Under the initial PiS proposal the judicial members were to be elected by a simple majority of the Sejm, which would have meant that PiS would select all of them. Duda objected to that, claiming that the opposition should also pick some members, so he proposed an election by Sejm by a 3/5 majority, and if such a procedure did not result in filling all the judicial posts on the KRS (highly likely under the current party composition of the Sejm), there would be an unusual method of voting whereby each MP would have only one vote for a single judicial KRS member, which would hopefully give the opposition some places on the KRS. Leaks from “negotiations” between the President and PiS leadership suggest that the new compromise proposal would be that the parliamentary majority would control nine and the opposition six of the judicial seats in the KRS.

All this shows a drastically unconstitutional approach to filling the judicial segment of the KRS: while the Constitution does not articulate explicitly who elects the judicial members of the KRS, since its enactment in

1997 it has been always accepted as a given that these posts are filled by judges. It became an unquestioned and uncontested constitutional custom. It is also supported by a structural interpretation: since Art. 187 of the Constitution provides explicitly that the Sejm elects its four representatives, if the constitution-makers wanted to give the Sejm a role also in electing the judicial members, it would have said so expressly. The KRS's fundamental role is to propose to the President all judicial appointments, so the idea that the judges themselves should play a dominant role in these decisions has been treated as an essential guarantee of judicial independence. Both PiS' and the President's proposals dispense with this guarantee, and the only difference between them is whether PiS will "take all" or share with the opposition the role in filling the judicial positions on the KRS. Both are unconstitutional by transferring from judges to politicians the decision on the judicial members of KRS. While the presidential proposal may seem slightly less radical, from a constitutional point of view it is equally objectionable as the initial proposal by PiS.

Another obviously unconstitutional point in the President's proposal regarding the KRS is that it ends the terms of office of its members (just like the initial PiS proposal) as of the day the new law enters into force, whereas the Constitution guarantees them a fixed term of office of four years. Again, this is one of those examples of "statutory amendments" of the Constitution for which the regime of PiS has become infamous.

Incidentally, in this respect a newly captured "Constitutional Tribunal" came in very handy. Just a few months ago, the newly subjugated CT (with a PiS majority and with three improperly elected "judges") found the current statute on the KRS unconstitutional on the basis that it discriminates against judges of the lower courts by establishing different procedures of appointment for judicial members of KRS depending on the level of courts they represent. The Constitution does not mandate any particular methods of selection of the judicial representatives in the KRS, though, and the specific design of the elections was perfectly within the legislative discretion. It also found unconstitutional a system of allegedly "individual" terms of office of particular judicial members of the KRS while it claimed that the Constitution requires a "joint/collective" term of office – even though the Constitution does not imply any such thing, and in any event, there is nothing about the statutory terms of office which renders it individual rather than collective. All in all, these constitutional objections were clearly pretextual, in order to pave the way to the new statute on the KRS. And President Andrzej Duda in a recent TV interview (26 November, at TVN24) referred to that "judgment" as a ground for ending the term of office of the KRS members. It shows how the "Tribunal" is not merely paralyzed but actually used as a positive aid in dismantling constitutional guarantees and structures.

Exactly the same observations on unconstitutionality can be made about the presidential bill on the Supreme Court. The original PiS bill envisaged a radical "zero option": all judges on the Supreme Court (including the Chief Justice) would have their terms of office terminated *ex lege*, and then the Minister of Justice (who is *ex officio* also Attorney General) would decide who of those judges may stay (if they apply for this privilege), and all of the remaining positions would be filled by the newly reformed KRS, i.e., indirectly by the PiS parliamentary majority. The President objected to such an outright capture of the SC by the ruling party, but again his proposal is just as unconstitutional as that of the PiS: All judges over 65 years of age would have to retire, and those of the retired judges who would ask for a permission to continue in office could be permitted to stay on (or not) by the President. Such a radical retirement age regulation would affect some 40 percent of the current judges of the SC, including the Chief Justice. In her case, the regulation would be directly contrary to an explicit 6-years term of office guaranteed by the Constitution (Art. 183), but according to the President, in the TV interview just mentioned, the retirement age rule has priority over constitutional term of office.

In addition, the President would introduce a new chamber to the SC, namely that of Public Affairs (in this he echoes the original PiS proposal), with some ominous implications. The chamber would be fully composed of PiS nominees (because, as a new chamber, it would be filled with brand-new judges, hence appointed by a new, PiS-controlled KRS). Among its competences would be adjudicating lawsuits regarding the (in)validity of parliamentary and other elections. A scary prospect, indeed.

As one can see, the presidential proposals regarding the laws on the KRS and the SC are littered with instances of unconstitutionality. Whether, and in what ways, those proposals will be amended by the PiS parliamentary majority in order to find a "compromise" between the President and PiS leadership is ultimately unimportant. Unconstitutionality, just as pregnancy, knows no degrees. The President, himself an academic lawyer, breaches

the explicit constitutional provisions and also constitutional customs, the latter being no less imperative than the textual articles of the Constitution. His July vetoes recall an old proverb: The mountain laboured and brought forth a mouse. And a rather ugly one, at that.

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SUGGESTED CITATION Sadurski, Wojciech: *Judicial “Reform” in Poland: The President’s Bills are as Unconstitutional as the Ones he Vetoed*, *VerfBlog*, 2017/11/28, <http://verfassungsblog.de/judicial-reform-in-poland-the-presidents-bills-are-as-unconstitutional-as-the-ones-he-vetoed/>, DOI: <https://dx.doi.org/10.17176/20171128-122808>.